UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 513, AFL-CIO,	)	Judge Michael A. Rosas
(Respondent Union),	)	
and	)	Case No. 14-CB-10424
OZARK CONSTRUCTORS, LLC, A FRED WEBER - ASI JOINT VENTURE,	)	
(Charging Party).	)	

RESPONDENT PARTY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISIONS

STATEMENT OF THE CASE

The International Union of Operating Engineers, Local 513, AFL-CIO, (hereinafter "Respondent" or "Union") takes exception to the decision of Administrative Law Judge, Michael A. Rosas (hereinafter "ALJ"). Specifically, the Union contends the undisputed evidence demonstrates Mr. Mark Overton (hereinafter "Mr. Overton") failed to either engage in or refrain from, concerted activity. Without concerted activity, or a refraining therefrom, Mr. Overton's actions receive no protection from 29 U.S.C. § 157 (2008), (hereinafter "Section 7"). Since Mr. Overton acted without concerted activity, the General Counsel's charge that the Respondent restrained and coerced Mr. Overton in the exercise of his rights guaranteed in Section 7 is a legal impossibility. The record cannot support a finding the respondent violated 29 U.S.C. § 158(b)(1)(A), (2008), (hereinafter "Section 8(b)(1)(A)" or "8(b)(1)(A)"). Respondent, therefore, prays the National Labor Relations Board take this opportunity to re-establish its Section 7 jurisprudence by again

explaining an objective finding of concerted activity, that is, activity performed with, or on the authority of, other employees; not solely or on behalf of the employee himself, is necessary before Section 7 provides protection under the National Labor Relations Act (hereinafter the "Act"). *Meyers Indus. (II),* 281 NLRB 882 (1986); *Susan Oles d/b/a/ Susal Oles, DMD*, 354 NLRB No. 13, 18 (2009).

ARGUMENT

A. MARK OVERTON'S COMPLETE LACK OF CONCERTED ACTIVITY, OR THE REFRAINING THEREFROM, PROVIDES THE UNION COMPLETE PROTECTION FROM AN 8(b)(1)(A) CHARGE. [Exception 1,2,3]

The entire purpose of the Act is an affirmative Congressional protection for collective, as opposed to individual, activity. *Meyers Indus. (II),* 281 NLRB 882,883-884, fn. 16 (1986); *E.I. du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 n.2 (9th Cir. 1983). As the Board is well aware, an employee must meet two aspects of Section 7 before he or she can take advantage of that Section's protection. Section 7's black and white reading, as well as the NLRB's interpretation, have held that there is no 'protected activity' unless that same activity is first concerted.[1] Section 7's text mandates consideration of 'concerted activity' in a two pronged approach. *Meyers Industries*, 268 NLRB 493, 496 (1984).

By its own terms, Section 7 does not provide an employee a shield unless the employee's action is: 1) concerted and, 2) protected. *Meyers Industries*, 268 NLRB 493, 494 (1984); *Meyers*

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[1] The full text of Section 7, 29 U.S.C. 157 reads, in full:

"Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain **collectively** through representatives of **their** own choosing, and to engage in other **concerted** activities for the purpose of **collective** bargaining or other **mutual** aid or protection, and shall also have the right to **refrain from** any and **all such activities** except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Emphasis added.

Indus. (II). Similarly, Section 7 is clear, there is no 'protected activity' unless there is 'concerted activity.' Ibid.

In interpreting the Act, the NLRB has provided firm guidance on what constitutes 'concerted' activity under Section 7. Applying an objective standard, the Board has found an activity is concerted when it is performed with, or on the authority of, other employees; not solely for or on behalf of the employee himself or the benefit of the emloyer. Ibid.; *Meyers Indus (II)*, 281 NLRB 882 (1986); *Susan Oles d/b/a/ Susal Oles, DMD*, 354 NLRB No. 13, 18 (2009).[2]

Congress made the determination that a union only violates 8(b)(1)(A) if it restrains or coerces an employee in the exercise of Section 7 rights.[3] Because concerted activity is an essential Section 7 requirement, without a concerted violation of a right enumerated in Section 7 a union, by definition, cannot have committed an 8(b)(1)(A) violation. Whether the General Counsel's theory rests upon Mr. Overton's own concerted activity, or a refraint from concerted activity of others, is immaterial. The lynchpin to the General Counsel's entire case is concerted activity and the ALJ's decision made no finding that Mark Overton was engaged in 'concerted activity' and no finding there was any 'concerted activity' from which to refrain.

Beside the requirement Section 7 protected activity must first be 'concerted' (or a refraining

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[2]The Board's requirement that concerted activity be *objectively* shown is buttressed by the fact the Board is to only look at the action itself, ignoring even the validity or reasonableness of the concerted act. Becker, Craig; "Better Than A Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act; 61 U.Chi. L.Rev. 351, 420 (1994); *citing*, *NLRB v. Washington Aluminum Co.*, 370 US 9, 16(1962).

[3]29 U.S.C. 158(b)(1) states in relevant part:
It Shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribed its own rules with respect to the acquisition or retention of membership therein; . . .

from 'concerted' activity), Congress also limited the types of 'concerted' activity it would protect. Specifically, Section 7 only applies to concerted activities that involve labor organizing, collective bargaining or enforcement of the collective bargaining agreement. 29 U.S.C 157; *NLRB v. City Disposal, Inc.*, 465 U.S. 822 (1984). The Respondent concedes in the past Courts have encouraged a liberal interpretation of these categories to effectuate Congress's intent. *Eastex, Inc. v. NLRB* 437 U.S. 556 (1978). A liberal interpretation of the defined Section 7 requirements and the narrow categories of activity to which those rights apply, however, does not permit the Board to eviscerate Congress's established guidelines. The latitude to interpret Section 7 Congress granted the Board does not relieve the Board of its obligation to interpret the Act in such a ways as to effectuate its purpose. *Meyers (II)* at 883.

The ALJ's decision finds "[a]n employee who complies with an employer's rule to report co-employee misconduct is deemed to engage in concerted activity within the context of Section 8(b)(1)(A) because Section 7 also gives employees 'the right to refrain from any or all such activities' by refusing to join with other employees who wished to ignore the employer's outstanding orders." (ALJ's Decision, (hereinafter "JD") at 9). (Emphasis added). This finding assumes facts not in evidence in this case, i.e., that Mr. Overton was in fact refusing to join with other employees who wished to ignore the employer's order. That finding has no basis. Congress's concerted activity requirement, and the Board's interpretation that concerted activity objectively be with or on behalf of another employee, requires an objective linkage to group action before any conduct is deemed 'concerted.' *Meyers Indus (II)*, at 884. The ALJ's decision found no such link. The record contains no link. There simply are no facts in the record to support this conclusion.

As the Respondent explained in greater detail in its Post-Hearing Brief, this case's record is

completely devoid of any instant of Mr. Overton objectively acting "with or on the authority of other employees." (Union's Post-Hearing Brief at 6, 7); (Transcript (hereinafter Tr.) 110-142, 160, 162-163). The record cannot even support a subjective finding of Mr. Overton acting in concert with anyone other than the Employer.

At the hearing before the ALJ, the General Counsel's witnesses did not testify that way. Mr. Overton testified he alone noticed the outrigger (Tr. 130). He alone investigated who operated the Telebelt (Tr. 140). He did not engage or attempt to engage other employees to act concertedly (Ibid.). He alone sought out and reported the alleged violation to an Employer representative. He alone investigated who may have been responsible (Ibid.). The Employer's testimony corroborates Mr. Overton's story (Tr. 151-170).

Having not engaged in any concerted activity on his own behalf, the only theory to hold Respondent in violation of 8(b)(1)(A) is if Mr. Overton refrained from concerted activity. However, the record is not only devoid of Mr. Overton engaging in concerted activity as defined in *Meyers Inds.* and *Meyers Indus. (II)*, the record is devoid of concerted activity completely.

The Charge and Complaint, as it existed at the time of the Hearing, alleged the Union restrained and coerced Mr. Overton in his Section 7 right by assessing a fine against him for reporting a safety violation (General Counsel's Exhibit, (hereinafter "GC Ex") 1(d)). The General Counsel's opening statement similarly framed the issue for hearing (Tr. 27-28).[4] The General

[4] "The General Counsel [will] establish[ ] that the only reason why Mr. Overton was disciplined and fined by the Union was because he had reported a safety violation. And we will show that reporting that safety violation has considerately been found by the Board to be a protected Section 7 right. Also, not reporting that violation itself would have been a violation of the collective bargaining agreement in effect. So, we will prove that the Union violated 8(b)(1)(A) in this case."

Counsel never moved to amend the Complaint to conform the evidence (Tr. 180). Not until the Union moved to dismiss the matter because the General Counsel had failed to make a prima facie case (Tr. 180) did the General Counsel's theory shift. The General Counsel no longer rested its case on the reporting of a safety violation. The General Counsel now claimed Mr. Overton refrained from joining the Union's "story" regarding the safety violation (Tr. 183) resulting in an 8(b)(1)(A) violation. Unfortunately for the General Counsel and Charging Party's case, like the lack of evidence of Mr. Overton's own concerted activity in reporting a safety violation, there is no evidence of concerted activity relating to the Union's "story" for Overton to have refrained from participating. There is no evidence the Union or its members had a "story" related to the Telebelt's outrigger or what that "story" would be if one existed. The Company did not testify the Union presented it with a differing version of facts than those to which Mr. Overton testified. Mr. Overton did not testify he refrained from joining any concerted activity. The record leaves Mr. Overton standing alone.

As the DC Circuit recently held, "The touchstone for concerted activity, must be some relationship between the individual employee's actions and fellow employees." *International Transportation Service, Inc., v. National Labor Relations Board*, 449 F.3d 160, 166 (2006). In this case, there is no relation, therefore no concerted activity, no restraint or coercion of a Section 7 right and no 8(b)(1)(A) violation.

B. ANY READING OF SECTION 7 AND 8(b)(1)(A) THAT EFFECTIVELY READS THE 'CONCERTED ACTIVITY' REQUIREMENT' OUT OF THE ACT CONTRADICTS *MEYERS INDUSTRIES* AND *MEYERS (II)* AND IS EXPLICIT JUDICIAL ACTIVISM. [Exception 1,2,3,6,7,8]

With no explicit finding of concerted activity, the ALJ's finding Respondent violated 8(b)(1)(A) stretches Section 7 beyond the limits Congress set forth in the Act. The ALJ's decision relies on both pre *Meyers (II)* and/or wrongly decided Board precedent in finding a violation "where

nonsupervisory leadmen act alone . . . if compliance with the Union's actions or mandate would affected [sic] the employee-member's employment status." JD at 9; *citing, Carpenters District Council of Sand Diego (Hopeman Bros.)*, 272 NLRB 584 (1984).

The ALJ's brief discussion of this line of cases closely follows the Counsel for the General Counsel's Brief to the Administrative Law Judge (hereinafter "GCB"). Counsel for the General Counsel cited both *Carpenters District Council of Sand Diego (Hopeman Bros.)* and *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977) for the proposition that despite not being related to recognized Section 7 activity, the Act protects reporting employee misconduct when required by and employer's policies because it impacts the reporting employees employment status (GCB at 12). For three distinct reasons, reliance on these cases is misplaced.

i. The ALJ relied on cases decided before the *Meyers Industries* definition of 'concerted activity' was settled law.

Both *Carpenters District Council of San Diego (Hopeman Bros.)* and *Chemical Workers Local 604 (Essex International)* were decided before the Board had cemented, and courts of appeal acknowledged, Section 7's 'concerted activity' requirement. *Meyers I*, decided just months before *Carpenters District Council of San Diego (Hopeman Bros.)* was immediately appealed to the D.C. Circuit. *See, Meyers Industries,* 268 NLRB 493 (1984); *Prill v. NLRB*, 755 F.2d 941 (DC Cir. 1985), cert denied, 474 U.S. 948 (1985). While the Board's definition of 'concerted activity' was in flux, it was reasonable for the *Hopeman Bros.* decision to rely on the seven year old holding in *Essex International.*

The *Prill I* court remanded the matter to the Board, not because it disagreed with the Board's interpretation, but because it wished the Board to consider policy implications of its *Meyers I*

decision. *Prill I* at 957. Not until 1988, after another appeal and denial of certiorari *Prill v. NLRB*, 835 F.2d 1481 (DC Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) was the Board's definition of concerted activity finalized. After a four year journey, the Board had reestablished Congress' intent. Section 7 requires concerted activity. *Prill II* at 1483. Concerted activity requires an employee to act "with the actual participation or on the authority of his co-workers." (Ibid.).

The *Meyers Industries* line of cases are clear in scope and intent. In 2009 the National Labor Relations Board requires concerted action before an employee can find Section 7 protection. Section 7 will protect an employee who engages in, or refrains from, concerted action, but an employee, like Mr. Overton, acting completely alone, does so at his own peril. To the extent the ALJ cites cases ignoring the *Meyers II* reading of 'concerted activity' the decision is both contrary to Board law and Congressional intent. This Board needs to clarify and reassert that 'concerted activity' involves other employees is a condition precedent to any Section 7 claim.

ii. The ALJ relied on cases that had a clear showing of an employee refraining from activity that would be considered 'concerted' by the *Meyers Industries* standard.

In finding the Respondent violated 8(b)(1)(A), the ALJ relied on *International Union of elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583 (2007); *Communication Workers Local 13000 (Verizon Communications)*, 340 NLRB 18 (2003); *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997); and *Oil Workers Local 7-103 (DAP, Inc.)*, 269 NLRB 129 (1984). These cases differ from Mr. Overton's, however, in that these cases actually have clear findings of an employee's refraining from otherwise concerted activity Section 7 and *Meyers Indus. (II)* protects. This finding, absent from ALJ Rosas's decision, cannot be held as precedent that Section 7 protects an individual employee acting alone.

In *Otis Elevators Co.* the charged union members were both following a direct order from their supervisor and refraining from concerted activity by refusing to join co-employees in working with an outside bargaining unit, in derogation of the collective bargaining agreement. 349 NLRB 583, 596-597. The *Verizon Communications* Board made a clear finding of refraining from concerted activity when a member refused to participate in the unprotected concerted act of refusing mandatory overtime. 340 NLRB18, 25. *University of the Pacific* concerned a refraining from undisputed concerted activity of avoiding work by hiding in a closet. 324 NLRB 1096, 1097. Finally, *DAP, Inc.*, involved two employees acting in concert to aid in a grievance procedure against another member who had cause those same two employees to perform extra, unnecessary custodial work. 269 NLRB 129, 130.

These cases, three of which were decided post *Meyers Indus. (II)* and *Prill (II)* are consistent with the Board's 'concerted activity' mandate. These cases also point to the undeniable requirement that Section 7 protects only those employee who act concertedly, a requirement Mr. Oveton did not fulfill.

iii. Even if 8(b)(1)(A) can be stretched in such away to do away with Section 7's concerted activity mandate for incidents where leadmen are required to follow an Employer's clear directive (a contention the Respondent argues 8(b)(1)(A) and *Meyers Indus. (II)* do not support) Mr. Overton's actions do not fit within that narrow exception.

As justification for finding an 8(b)(1)(A) violation, the ALJ's decision repeats the erroneous position that the Employer's policy and National Maintenance Agreement (NMA) required Mr. Overton to report Ryan Allison to the Employer (JD at 9,10). This is simply not the case.

The NMA requires only that employees, be "bound by the safety rules and regulations as established by the Owner, the Employer, this agreement, or applicable Safety Laws." (GC Ex. 4 at

11). The only Safety Regulations in the record require employees to "report all accidents/incidents to their supervisor immediately, no matter how slight" so that the Employer, not employee, can "provide prompt care, and investigate & eliminate hazards that may cause others to be injured." (JD at 3; GC Ex. 6, 11; Tr. 42-44, 60-61, 108-109, 151-154).

Witness testimony did not reveal any safety rules other than those articulated GC Ex. 4 and CG Ex. 6. Roger Gagliano, the Employer's representative, did not testify Mr. Overton's working foreman position required any responsibility to report individual employees who may have committed safety violations (Tr. 42, 83-84). In terms of safety, a working foreman had the same responsibility as every other employee, whether in or outside of the bargaining unit.

Andy Westbrook, the Employer's job superintendent, echoed Mr. Gagliano's testimony (Tr. 153-154). Mr. Overton's responsibility regarding safety violations was the same as every other employee. Overton was only required to report the accident or incident (Ibid.). Though Mr. Westbrook testified Mr. Overton could possibly have opened himself to discipline if he had not reported a discovered safety violation, the requirement was in no way connected to Mr. Overton's position of working foreman. Further, the Employer's safety regulations explicitly do not require Mr. Overton to report which individual employee he believed to be responsible for the infraction (Ibid.; GC Ex. 6, p. 3; 11 p. 3).

The ALJ's could not have reached his decision unless he ignored Section 7's 'concerted activity' mandate, and looked past the complete lack of concerted activity in the record. Surprisingly, even according to the ALJ's erred reasoning, the Respondent still cannot be found in violation of 8(b)(1)(A).

According to the ALJ"s decision, Mr. Overton was deemed to be engaged in protected

Section 7 activity because his position required him to report a co-employee's safety violation (JD at 9, 10); (Emphasis added). Section 7's clear mandate of 'concerted activity' and the Board's requirement that such 'concerted activity' be objective aside; as shown above the record clearly shows neither Mr. Overton's position nor the Employer's work rules required Mr. Overton, or any other employee, to report co-employees safety violations. For that reason, the ALJ's analysis and reliance on cases such as *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997); *Industrial Union of Marine and Shipbuilding Workers of America, Local No. 9*, 279 NLRB 617 (1986); *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977); and *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584 (1984); is misplaced.

University of the Pacific involved a leadperson whose defined responsibility was to "monitor [unit] work and employees in his group" and report "any problems he may have with personnel, such as unsafe work practices or taking a long break or non performance of their job." 324 NLRB 1096, 1097 (Emphasis added). The member in question in *Industrial Union of Marine and Shipbuilding Workers of America, Local No. 9,* was required, as part of his specific position as shipfitter leadman, to ensure other, individual, employees moved between ships in a timely fashion. 279 NLRB 617. Like, *University of the Pacific*, the leadman in *Essex International* was required, to report "whenever any employee is absent from his work area without prior notice, or is not performing his work properly." 233 NLRB 1239, 1240 (Emphasis added). His reporting of individual employee's was described as an "essential part" of his job (Ibid.). Finally, the employer in *Hoperman Bros.*, on which the ALJ's decision primarily relies, not only required its leadman to "make sure other employees are working safely" but the leadman enforced a specific rule regarding prohibitions on fighting and possessing a weapon on the employer's property. 272 NLRB 584, 587 (Emphasis

added). Each case included direct requirements to report employee action.

Unlike the cases the ALJ's decision relies, Mr. Overton was not required to report a co-employee or member who he believed may have caused an safety infraction. Mr. Overton was only required to report the safety incident itself so the Employer could make an investigation. Mr. Overton's acting in concert with the Employer to effectuate that investigation is not Section 7 concerted activity, even by the the ALJ's overly broad reading of 8(b)(1)(A).

Even though Mr. Overton's actions are distinguishable from the broad 8(b)(1)(A) reading described in this section, to the extent these cases have found an 8(b)(1)(A) violation beyond Section 7's mandates, these cases should be declared to be wrongly decided and overturned. 29 U.S.C. § 157. The Board should take this opportunity to correct overreaching by previous Boards and administrative law judges and interpret Sections 7 and 8(b) to conform to Congress's mandate.

There is no concerted activity unless an employee has objectively performed an act with, or on the authority of, other employees. *Susan Oles, DMD*; *Meyers Indus. (II)*. There is no Section 7 violation unless there is an interference with an employee's action regarding labor organizing, collective bargaining or enforcement of a collective bargaining agreement. 29 U.S.C. § 157; *NLRB v. City Disposal, Inc.* Absent those findings a Union is free to discipline its members without violating the National Labor Relations Act. This reading of Section 7 and 8(b) may result in decisions which some believe, for philosophical reasons, to be incorrect. Nevertheless, this reading is consistent with Congress's view of the Act. It is Congress's role to expand or contract the Act's protections, not the Court's or Board's. *Meyers (II)* at 883. As the Act stands today, Congress intends it to protects only concerted activity between employees in defined circumstances. As the record in this case stands, Mr. Overton acted only in concert with his employer and the National

Labor Relations Act can not protect him.

C. THE BOARD HAS PREVIOUSLY CORRECTED DECISIONS EXPANDING 8(b)(1)(A) BEYOND ITS PROPER SCOPE AND SHOULD TAKE THE OPPORTUNITY TO CONTINUE THIS WORK. [Exception 1,2,3,6,7,8].

The Board is to foster "employee's rights to organize for mutual aid without employer [or union] interference" or refrain therefrom. *Republic Aviation Corp., v. NLRB*, 324 US 793, 798 (1945). The Board, alone, or through adoption of an ALJ's opinion, is not bestowed the power to create new Section 7 rights out of whole cloth.

From time to time the Board has recognized and addressed its own overreaching. As recently as the year 2000 this Board has addressed overly broad interpretations of 8(b)(1)(A) and taken steps to bring that Section back within its Congressionally intended confines. The Board should take this opportunity to continue its work.

In *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), this Board readdressed and repositioned Section 8(b)(1)(A) by finding its "proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act." Id. The Board should address 8(b)(1)(A) again and conform its interpretation to the Section's original purpose.

Prior to *Sandia National Laboratories*, the Board would frequently allow the NLRA to entertain grievances and enforce policies Congress had intended to be taken through the procedures of the Landrum Griffin Act (hereinafter "LMRDA") (29 U.S.C. § 411, (2008); Ibid.). Though Board precedent had allowed this reading for almost thirty years, *Carpenters Local 22 (Graziano*

Construction), 195 NLRB 1, (1972), the Board took the opportunity to more appropriately interpret 8(b)(1)(A) to conform to Congress's original intent. In restraining its own reach to conform 8(b)(1)(A) to Congress's intent, the Board examined the section's history.

Looking at 8(b)(1)(A)'s 'restraint or coercion' language, the Board determined 8(b)(1)(A)'s proscriptions were limited to "situations involving actual or threatened economic reprisals and physical violence by unions or their agents against specific individuals or groups of individuals in an effort to compel them to join a union or to cooperate in a union's strike activities." *Sandia National Laboratories*; citing *Typographical Union (American Newspapers Publishers Assn.),* 86 NLRB 951, 956 (1949), *enfd.* 193 F.2d 782 (7th Cir.1951). The Board has found that this interpretation is the interpretation that "faithfully reflected Congress' purpose," 8(b)(1)(A) was not intended to regulate internal Union matters, it was to regulate a Union's mass picketing and use of violence toward employees in the conduct of a strike (Ibid.).

In this case, the General Counsel and ALJ are asking the Board to ignore its prior holdings in *Meyers Indus. (II)* and *Sandia National Laboratories*. The Board has held 8(b)(1)(A) cannot be used to grant the Board jurisdiction over complaints Congress reserved to the Courts under the LMRDA. 29 U.S.C. § 401 *et seq.*, (2008); *Sandia National Laboratories* at 1423. However, that is exactly what the General Counsel and ALJ are asking the Board to do in this case.

Mr. Overton never brought a complaint to the Union (Tr. 99-122). Mr. Overton never attended the Executive Board meeting to address the charges against him (GC Ex. 12), (Tr. 120). Mr. Overton did not seek legal redress through the LMRDA, the avenue Congress explicitly created to address the rights of union members within their unions. 29 U.S.C. § 401, *et seq.* Mr. Overton did not even bring this charge to the NLRB, the Employer brought the charge on its own behalf (GC

Ex. 1(a), (c)). Whether the ALJ agrees with the Union's actions toward Mr. Overton is irrelevant. The Board must not allow the ALJ's Decision to expand Section 7 and 8(b)'s reach beyond the limits Congress has established to redress a perceived wrong Mr. Overton did pursue.

D. THE UNION'S POSITION STATEMENT, SUBMITTED IN THE GENERAL COUNSEL'S CASE, MUST BE TAKEN AS SUBSTANTIVE EVIDENCE OF THE RESPONDENT'S RATIONALE. [Exception 4,5].

Immediately before closing of both the General Counsel and Employer's cases, Counsel for General Counsel introduced GC-17, identified as the Union's position statement (Tr. 177, 180). Over the Union's initial objection, GC-17 was admitted into evidence as part of the General Counsel's case (Tr. 180) as an "offer of proof" to aid in determining whether there was an 8(b)(1)(A) violation. (Tr. 179). GC-17 thus became a part of the General Counsel's case. *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F.Supp 308 (7th Cir. 1940); *Artmoore Co. v. Dayless Mfg. Co.*, 208 F.2d. 1 (7th Cir. 1953); *Evergreen America Corp. And Local 1964, International Longshormen's Association, AFL-CIO*, 348 NLRB 178, 181 L.R.R.M 1288 (2006) *at* (III. The Position Papers).

The General Counsel offered the Union's position statement to show the reason Respondent brought internal charges against Mr. Overton (Tr. 179). The Union's position was that Mr. Overton was verbally abusive to fellow members and, contrary to the General Counsel and Employer's positions, the Union refused to consider any matter relating to safety issues on the job (GC-8(b) & 17) (Tr. 186). The evidence contained in GC-17, the General Counsel's own exhibit, is the un-rebutted reasoning and justification for the Respondent's actions. The General Counsel offered this evidence and cannot escape the undenied and unimpeached statements it contains. *Atmoore Co. v. Dayless Mfg. Co.*, 208 F.2d. 1 (7th Cir. 1953). By offering GC-17, the General Counsel had vouched

for the exhibit's integrity. *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F.Supp 308 (7th Cir. 1940). While Respondent would not suggest that uncontradicted evidence alone obligates the trier of fact to accept the evidence as true, *Fontenot v. McCall's Boat Rentals, Inc.*, 227 Fed.Appx. 397 (5th Cir. 2007), the fact remains that uncontradicted evidence cannot be ignored. *Washington v. Houston Lumber Co.*, 310 F.2d 881 (10th Cir. 1962). This is especially glaring when an adverse party introduces evidence corroborating its opponent's position. Similarly, though it is recognized that a party may introduce documents prepared by an adversary without being bound thereto, neither the General Counsel nor the Employer indicated GC-17 was evidence of anything other than the Respondent's sincere motivation and reasoning. *Jefferson Sav. & Loan Ass'n v. Lifetime Sav. & Loan Ass'n*, 396 F.2d 21, 23-24 (9th Cir. 1968). GC-17 was accepted as relevant evidence as part of the General Counsel's case (Tr. 179, 180). The General Counsel did not rebut the Respondent's assertion that CG-17 was substantive evidence (Tr. 183-185).

Finally, the tenuous relationship between Mr. Overton and the Respondent, absent any alleged safety violation, is supported in the record. The General Counsel's Exhibits agreed the Respondent's internal charges were based upon Mr. Overton's abusive behavior toward other members. The Union alerted Mr. Overton that the charges against him were related to his "ongoing problem" of screaming and speaking abusively toward other employees of which he had been "warned about repeatedly." (GC-8(b)). Mr. Westbrook admitted Mr. Overton's treatment towards other union members created a strained relationship (Tr. 165, 166). Contrary to Mr. Gagliano's assertion that the Employer was never made aware of the Union's concerns regarding Mr. Overton's treatment of other employees (GC-9), Mr. Westbrook admitted the Employer knew of these concerns (Ibid.). The Union found merit in the internal charges only after Mr. Overton failed to appear before

the Union as requested (GC-8(a), 8(b), 12, 13; Tr. 120). By submitting the Union's position statement, it accepted the Union did not consider any alleged safety violations when considering Mr. Overton's charges of verbal abuse (GC-17). The fact no grievances concerning Mr. Overton's behaviors were formally brought to the Company support the fact that the Respondent viewed Mr. Overton's behavior as an internal Union matter.

The ALJ was left with the General Counsel's own uncontradicted evidence that the Respondent did not discipline Mr. Overton for reporting safety violations. The ALJ was left with the General Counsel's own uncontradicted evidence that the Respondent did not discipline Mr. Overton for engaging in or refraining from engaging in rights protected by Section 7 of the Act. The ALJ was is left with the General Counsel's own uncontradicted evidence that the Respondent's sole reason for bringing internal charges against a union member was for "verbal abuse of fellow members." This evidence is binding on the General Counsel and, through inaction (Tr. 180), the Employer. *Menz v. New Holland North American, Inc.*, 507 F.3d 1107, 1113 (8th Cir. 2007). With the Respondent's position's statement standing without comment, and supported by the record in the General Counsel's case, the General Counsel failed to carry its burden.

CONCLUSION

The National Labor Relations Board must take this opportunity to re-establish its Section 7 jurisprudence by again explaining the section requires an unyielding objective finding of concerted activity before the Act provides protection. For Section 7 to provide protection, there must be on objective showing of concerted activity, that is, activity performed with, or on the authority of, other employees; not solely or on behalf of the employee himself, is necessary before Section 7 provide

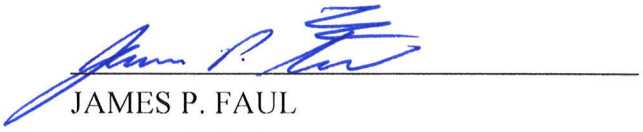
an employee statutory protection under the National Labor Relations Act.

For the above reasons, Respondent's conduct was not in violation of Section 8(b)(1)(A) of the National Labor Relations Act. The Respondent's exceptions should be granted in full, the ALJ's decision should be reversed, and a full and proper remedy should be ordered.

Respectfully submitted this 15 th day of October, 2009.

Respectfully submitted,
BARTLEY GOFFSTEIN, L.L.C.

JEFFREY E. HARTNETT



JAMES P. FAUL
4399 Laclede Ave
St. Louis, Missouri 63108
Telephone: 314-531-1054
Facsimile: 314-531-1131
jhartnett@bgbllaw.com
jfaul@bgbllaw.com

Attorneys for Respondent Union

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that copies of the aforesaid were served by overnight mail for delivery on Friday, October 16, 2009 as follows: Eight copies of the Respondent's Exceptions and Brief in Support have been filed with the National Labor Relations Board in Washington D.C., as well as through the National Labor Relations Board electronic filing system, and copies served on the other parties, with a statement of such service this October 15, 2009.

Rotimi Solanke, for the General Counsel
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103-2829

Russell C. Riggan, Attorney for Complainant
Lewis, Rice & Fingerish, L.C.
500 N. Broadway, Suite 2000
St. Louis, Missouri 63102-2147